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No. 82-940

In The

Supreme Court of the United States

October Term 1982

ELIZABETH ANDERSON HISHON,

Petitioner,

vs.

KING & SPALDING,

Respondent.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF PETITIONER

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QUESTION PRESENTED

Whether King & Spalding and other large institutional law firms that are organized as partnerships are, for that reason alone, exempt from Title VII of the Civil Rights Act of 1964, and are free (a) to discriminate in the promotion of associate lawyers to partnership on the basis of sex, race or religion; and (b) to discharge those associates whom they do not admit to partnership based on reasons of sex, race or religion under an established "up-or-out" policy.

INTERESTED PARTIES

The following listed parties have an interest in the outcome of this case:

Elizabeth Anderson Hishon (Petitioner)

King & Spalding (Respondent)

William K. Meadows
Charles L. Gowen
Hughes Spalding, Jr.
James M. Sibley
Griffin B. Bell
Charles H. Kirbo
John Izard
Pope B. McIntire
Kirk M. McAlpin
Frank C. Jones
Richard A. Denny, Jr.
Harry C. Howard
William H. Izlar, Jr.
R. Byron Attridge
Bradley Hale
Robert W. Hurst
Robert L. Steed
Henry Hall Ware III
Daniel J. O'Connor, Jr.
Hugh Peterson, Jr.
John A. Wallace
Edward J. Hawie
John C. Staton, Jr.
David Lee Coker
John D. Hopkins
A. Felton Jenkins, Jr.
G. Lemuel Hewes
Horace H. Sibley
Charles M. Shaffer, Jr.
W. Donald Knight, Jr.
Joseph R. Gladden, Jr.

James H. Wildman
Joseph B. Haynes
Herschel M. Bloom
Michael C. Russ
Charles H. Battle, Jr.
Walter W. Driver, Jr.
Russell R. French
George H. Lanier
Lanny B. Bridgers
Clarence Haverty Ridley
William C. Clineburg, Jr.
Richard G. Woodward
Theodore M. Hester
William F. Nelson
James A. Rubright, Jr.
Joseph R. Bankoff
Ralph B. Levy
Donald S. Kohla
John Trapnell Glover
Nolan C. Leake
Charles H. Tisdale, Jr.
Russell B. Richards
George S. Branch
Michael E. Ross
Ruth West Garrett
William B. Fryer
Michael R. Horton
Scott J. Arnold
Bruce N. Hawthorne
Albert H. Conrad, Jr.
Henry L. Bowden, Jr.

Partners in King & Spalding*

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* As listed in Martindale-Hubbell Law Directory 1982.

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OPINIONS AND JUDGMENTS BELOW

The opinion of the Court of Appeals is officially reported as *Hishon v. King & Spalding*, 678 F. 2d 1022 (11th Cir. 1982), and is reproduced as Appendix A to the Petition for a Writ of Certiorari.[1] App. A-1 through A-16. The November 25, 1980 opinion of the district court is unofficially reported as *Hishon v. King & Spalding*, 25 Empl. Prac. Dec. (CCH) ¶ 31,703 (N. D. Ga. 1980) (Appendix B to the Petition, App. A-17 through A-26), and the final judgment dismissing the complaint in conformity with that opinion was entered on November 26, 1980. R. 272; J.A. 259.[2]

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on June 17, 1982. Appendix C to the Petition, App. A-27 through A-28. A timely petition for rehearing *en banc* was denied on September 9, 1982. Appendix D to the Petition, App. A-29 through A-30. The petition for certiorari was filed within 90 days of that date and was granted on January 24, 1983. 51 U. S. L. W. 3552 (Jan. 24, 1983).

Jurisdiction is conferred on this Court by 28 U. S. C. § 1254(1).

STATUTES INVOLVED

Section 701 of Title VII of the Civil Rights Act of 1964 provides in pertinent part:

> **Definitions**
>
> **(a)** The term "person" includes one or more individuals, governments, governmental agencies, politi-

[1] The Petition for a Writ of Certiorari shall be referred to hereinafter as "the Petition." The Appendix to the Petition will be cited as "App."

[2] Joint Appendix.

cal subdivisions, labor unions, *partnerships*, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, . . .

• • •

(f) The term "employee" means an individual employed by an employer . . .

42 U. S. C. § 2000e(a), (b), (f) (emphasis supplied).

"Unlawful employment practices" are defined in § 703 of Title VII as follows:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U. S. C. § 2000e-2(a)(1), (2).

STATEMENT OF THE CASE

Petitioner, Elizabeth Anderson Hishon, is a female lawyer who was employed by King & Spalding as an associate from 1972 until her discharge in December 1979.

Her Title VII complaint[3] (R. 4-19; J.A. 6-26) alleging that King & Spalding discriminated against her on the basis of sex by denying her promotion to partnership and by terminating her employment as an associate under an "up-or-out" policy was dismissed by the district court for want of subject-matter jurisdiction under Rule 12(b)(1) on the ground that Title VII does not apply to sex discrimination relating to partnership decisions. App. A-17 through A-26.

The Allegations of the Complaint

King & Spalding is a partnership engaged in the practice of law in interstate commerce with offices in Atlanta, Georgia, and Washington, D. C. Complaint ¶ 2(a); R. 4; J.A. 6. King & Spalding has more than fifty partners, and employs more than fifty other lawyers as associates and more than fifty non-lawyers in secretarial, paralegal and clerical positions. Complaint ¶ 2(b); R. 4; J.A. 6.

King & Spalding was formed in 1885. R. 161; J.A. 153. At the time the complaint was filed, King & Spalding had never admitted a woman to partnership throughout its almost 100-year history. Complaint ¶ 2(c); R. 4-5; J.A. 6-7. From 1944 until 1977, however, King & Spalding employed a woman (Ms. Antha Mulkey) as the firm's only "permanent associate."[4]

Ms. Hishon was only the second female lawyer employed by King & Spalding. She was employed in 1972 following graduation with honors from the Columbia University School of Law. Complaint ¶ 5; R. 5; J.A. 7. The complaint alleged that petitioner was induced to accept

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[3]The district court's jurisdiction was based on 42 U. S. C. § 2000e-5(f)(3) and 28 U. S. C. § 1331.

[4]See listings of King & Spalding (formerly named Spalding, Sibley & Troutman (Jan. 1943-June 1946), Spalding, Sibley, Troutman & Kelley (July 1946-1955), and Spalding, Sibley, Troutman, Meadow & Smith (1956-1961)) in Martindale-Hubbell Law Directory for the years 1944-1977.

employment with King & Spalding by the express promise and representation that she would be considered for partnership on a fair, non-discriminatory basis upon satisfactory completion of five or six years' employment as an associate. Complaint ¶ 8(c), (d); R. 6; J.A. 9. The complaint also alleged that King & Spalding made similar representations to other promising law school graduates (complaint ¶ 8; R. 6; J.A. 8) and that such promises and representations were "terms, conditions and privileges" of petitioner's employment by King & Spalding within the meaning of § 703(a)(1) of Title VII. Complaint ¶¶ 4, 16(a); R. 5, 8-9; J.A. 7, 11.

The complaint alleged that, despite King & Spalding's promises and representations of fair and non-discriminatory treatment, King & Spalding discriminated against petitioner on the basis of sex and, in considering her for promotion to partnership, refused to utilize the same standards it applied to male associates who were admitted to partnership. Complaint ¶ 17(h); R. 11; J.A. 13.

The complaint also alleged that petitioner's employment as an associate was terminated as a result of the sex discrimination practiced by King & Spalding. Complaint ¶¶ 13, 17(c); R. 8-10; J.A. 10-12. The same discriminatory decision to refuse to admit petitioner to partnership led automatically to her dismissal as an associate under the firm's "up-or-out" policy. *Id.*

The Proceedings Below[5]

The district court imposed a stay on merits discovery and granted petitioner a limited period within which to

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[5]The Equal Employment Opportunity Commission moved to participate in the action as *amicus curiae*, and for access to the record (J.A. 109-10) which the district court had placed under seal. R. 90-92; J.A. 87-89. The district court granted the

(Continued on next page)

conduct discovery restricted to the "coverage" issue. 678 F. 2d at 1025 (R. 88-89; J.A. 86-87).

In partial response to the petitioner's discovery requests, King & Spalding produced a written partnership agreement. R. 161-72; J.A. 153-64. The King & Spalding partnership agreement supersedes the Georgia law of partnerships and performs the same function as a corporate charter by conferring on King & Spalding the principal attributes of incorporation, including (1) perpetual existence (¶¶ 2, 5(a); R. 161-62; J.A. 153-54), (2) a trade name "King & Spalding" which is not the name of any of its living partners (¶ 1; R. 161; J.A. 153), (3) centralized management and control by a committee that is the equivalent of a corporate board of directors (¶ 14; R. 170-71; J.A. 162-63), and (4) a limitation on each partner's ownership interest in the assets of the firm to the amount of his "capital account." ¶ 9(a); R. 166-67; J.A. 158-59.

(Continued from previous page)

EEOC's motion to participate, but denied it access to the record. J.A. 218-19. On appeal, the EEOC again moved for access to the record and to participate as *amicus curiae*. J.A. 5. Although the court of appeals granted the Commission's request to participate in oral argument, it failed to rule on its motion for access to the record. J.A. 5.

The Commission's position in this case was succintly stated in its brief in support of the petitioner's request for rehearing *en banc* in the court of appeals:

> The EEOC, as the agency charged by Congress to enforce and interpret Title VII, submits that the panel's conclusion is erroneous, in that it conflicts with the language and intent of the statute and with relevant Supreme Court case law and rules of statutory construction. Moreover, the decision of the panel majority does not simply deprive the plaintiff in this case of recourse under Title VII. Rather, as the only appellate decision on this issue, it signals to all major legal or other professional partnerships that they may deny equal advancement opportunity to women and minority associates without fear of retribution under the statute.
>
> Brief of EEOC, at 2.

King & Spalding objected to the majority of petitioner's discovery and, when the petitioner moved to compel under Rule 37 of the Federal Rules of Civil Procedure, the district court denied the motion and simultaneously dismissed the complaint under Rule 12(b)(1) for want of subject-matter jurisdiction. The district court ruled that, accepting petitioner's allegations of sex discrimination by King & Spalding as true, such discrimination was outside the coverage of Title VII because King & Spalding is organized as a partnership. The district court analogized a law partnership to a marriage and the application of Title VII to a shotgun wedding:

> In a very real sense a professional partnership is like a marriage. It is, in fact, nothing less than a "business marriage" for better or worse. Just as in marriage different brides bring different qualities into the union—some beauty, some money, and some character—so also in professional partnerships, new mates or partners are sought and betrothed for different reasons and to serve different needs of the partnership. Some new partners bring legal skills, others bring clients. Still others bring personality and negotiating skills. In both, new mates are expected to bring not only ability and industry, but also moral character, fidelity, trustworthiness, loyalty, personality and love. Unfortunately, however, in partnerships, as in matrimony, these needed, worthy and desirable qualities are not necessarily divided evenly among the applicants according to race, age, sex or religion, and in some they just are not present at all. To use or apply Title VII to coerce a mismatched or unwanted partnership too closely resembles a statute for the enforcement of shotgun weddings.
>
> 25 Empl. Prac. Dec. (CCH) ¶ 31,703, at 20,062 (R. 266; App. A-20).

The trial court refused to look beyond the common-law definition of partnership and allow petitioner to demonstrate that King & Spalding (as is true of many other law

firms) is organized and run in a manner that departs significantly from the common-law model of a "partnership," and has many attributes of a corporation. Judge Edenfield stated:

> Undeniably, a private professional partnership is a voluntary association. . . . Plaintiff's emphasis on the composition and internal arrangements of this particular partnership cannot alter this inescapable conclusion. King & Spalding is a partnership, created and perpetuated as such and subject to the partnership laws of Georgia and the United States. The legal characterization of what an entity is, of course, is purely a question of state law, . . .
>
> These observations effectively dispose of plaintiff's prayers for further discovery.

Id. (R. 265; App. A-19).

In dismissing the complaint, the district court was heavily influenced by what it perceived as an infringement of rights of "freedom of association" of King & Spalding's existing partners that would result if the firm were subjected to the coverage of Title VII and prohibited from using race, sex and religion as criteria in the selection of partners. The court saw itself confronted with the "dilemma" of having to choose between Title VII to cover partnership decisions of large law firms on the one hand—a question which the court said was "doubtful and obscure" —and ruling that Title VII violates "the right of defendant to freedom of association" if Title VII were applied to the selection of partners by King & Spalding from among its associates. *Id.* at 20,064 (R. 271; App. A-24). The court resolved the dilemma by deciding the "doubtful and obscure" question of coverage of Title VII over law firm partnerships against the petitioner, but with the observation that "the court is humbly aware that in reaching this conclusion it may have erred." *Id.*

The district court described its dilemma in the concluding paragraph of the opinion:

> In the end, then, the court faces this dilemma: (1) If the court finds that the case is covered by Title VII the defendant's constitutional right to freedom of association is then thrown into head-on conflict with plaintiff's constitutional right not to suffer discrimination in the terms, conditions and privileges of her employment; (2) if the court construes the Act as not covering plaintiff's claim, then there is no constitutional problem and the court should dismiss the case for want of subject-matter jurisdiction. To the court, while the right of defendant to freedom of association seems clear, the coverage of the Act seems doubtful and obscure. The court is humbly aware that in reaching this conclusion it may have erred. In considering this possibility, the court considered a balancing process which would give effect to both constitutional rights by allowing the case to proceed but would require the plaintiff, in such rare instances, to show by clear and convincing proof that, irrespective of all other justifications claimed by defendant, naked discrimination was the sole and producing cause of plaintiff's rejection as a partner. The court, however, could find no hint of any authority for a trial court to so alter the burden of proof. All of these questions will have to be resolved by a higher authority, legislative or judicial. In the meantime, the court concludes that it has no subject-matter jurisdiction of plaintiff's claim and the case is, therefore, DISMISSED.
>
> *Id.* (R. 271; App. A-24, 25).

On appeal, a divided panel of the Eleventh Circuit Court of Appeals affirmed, with Circuit Judge Peter T. Fay and Senior District Judge George C. Young in the majority, and Circuit Judge Gerald B. Tjoflat dissenting. *Hishon v. King & Spalding*, 678 F. 2d 1022 (11th Cir. 1982). The majority ruled:

> **A dismissal under Fed. R. Civ. P. 12(b)(1) is proper only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim, which would entitle [her] to relief." *McLain v.***

> *Real Estate Board of New Orleans, Inc.* . . . Appellant suggests that Title VII must be given the "broadest possible interpretation" in order to effectuate its purpose—to remedy acts of discrimination within the employment context. *Rogers v. EEOC*, 454 F. 2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U. S. 957, 92 S. Ct. 2058, 32 L. Ed. 2d 343 (1972). . . . Even under the most liberal reading we cannot find the requisite congressional intent to permit Title VII's intervention into matters of voluntary association. We can conceive no set of facts which would entitle her to relief under Title VII with respect to partnership decisions. This renders the dismissal of her claim proper.
>
> 678 F. 2d at 1026 (App. A-6).

Although the majority refrained from expressly endorsing the trial court's freedom of association rationale, the majority was heavily influenced by the notion that a partnership is a "voluntary association," and that partners of a "voluntary association" should be free to select those with whom they will "associate" in the practice of law in the absence of clear evidence of "the requisite congressional intent to permit Title VII's intervention into matters of [discrimination by] voluntary association[s]." *Id.*

Judge Tjoflat dissented on the ground that Title VII applies to petitioner's firing as an associate as a direct consequence of King & Spalding's decision to refuse her admission to partnership. Since this decision was alleged to have been based on sex, her firing, therefore, constituted employment discrimination in violation of § 703(a) (1) and § 703(a) (2) of Title VII. 678 F. 2d at 1030 (App. A-15, A-16).

Petitioner's motion for rehearing *en banc* was denied on September 9, 1982. App. A-29. Certiorari was granted by this Court on January 24, 1983. 51 U. S. L. W. 3552.

SUMMARY OF ARGUMENT

The complaint stated a sex discrimination claim under each of three legal theories. *First*, the complaint alleged that the relationship between a partner and a large institutional law firm is primarily one of "employment" which is covered by Title VII. *Second*, the complaint alleged that the opportunity of "making partner" which King & Spalding held out to petitioner and to other associates to induce them to accept employment with the firm was both an "employment opportunity" and a "term, condition and privilege of [her] employment" within the meaning of § 703(a) of Title VII. *Third*, the complaint alleged that petitioner's employment as an associate was terminated by King & Spalding as a direct result of the fact that she had been rejected for partnership because of her sex.

Because the complaint was dismissed under Rule 12(b)(1) for want of subject-matter jurisdiction, the judgment must be reversed "unless it appears beyond doubt that plaintiff can prove no set of facts" under which sex discrimination in the selection of partners by any law firm could ever constitute "employment discrimination" "which would entitle [her] to relief" under Title VII. *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U. S. 232, 246 (1980).

Partnerships are "persons" whose employment practices are covered by § 701(a) of Title VII. King & Spalding employs more than 50 associates and 50 secretarial and clerical personnel and is engaged in the practice of law, "an industry affecting commerce" [*Goldfarb v. Virginia State Bar*, 421 U. S. 773 (1975)], with offices in Atlanta and Washington. King & Spalding is, therefore, an "employer" covered by Title VII and cannot claim either a professional exemption [*Connecticut v. Teal*, 50 U. S. L. W. 4716 (June 21, 1982) (No. 80-2147); *Goldfarb v. Virginia State Bar*, 421 U. S. 773 (1975)] or an exemption based on the fact that it is organized as a partnership.

An associate of a law firm is an "employee" whose "term[s], condition[s] and privilege[s] of employment" and whose "employment opportunities" are protected by Title VII from discrimination on the basis of race, religion, sex, or national origin. *Kohn v. Royall, Koegel & Wells,* 496 F. 2d 1094 (2d Cir. 1974); *Lucido v. Cravath, Swaine & Moore,* 425 F. Supp. 123 (S. D. N. Y. 1977); *Blank v. Sullivan & Cromwell,* 418 F. Supp. 1 (S. D. N. Y. 1975).

The issue in this case is whether acts of sex discrimination practiced by a law firm in refusing to admit female associates to partnership (and the subsequent discharge of those associates who do not "make partner" under an up-or-out policy) constitute "unlawful employment practices" which are prohibited by § 703(a) of Title VII.

In making this determination, it must be remembered that Title VII was "intended to be broadly inclusive" [*County of Washington v. Gunther,* 452 U. S. 161, 178 (1981)], that "Congress required 'the removal of . . . barriers to employment' and *professional development* that had historically been encountered by women, blacks and other minorities" [*Connecticut v. Teal,* 50 U.S.L.W. at 4718 (emphasis supplied)], and that Congress, therefore, "intended to prohibit *all practices in whatever form* which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin . . . [as] the 'highest priority.'" *Franks v. Bowman Transportation Co.,* 424 U. S. 747, 763 (1976) (emphasis supplied).

In enacting Title VII, Congress rejected the narrow common-law definition of "employment" in favor of the more comprehensive and economically realistic definition of employment in the National Labor Relations Act [*NLRB v. Hearst Publications,* 322 U. S. 111 (1944)], the Social Security Act [*United States v. Silk,* 331 U. S. 704 (1947)], and the Fair Labor Standards Act [*Goldberg v. Whitaker House Cooperative, Inc.,* 366 U. S. 28 (1961)].

The petitioner has advanced two basic arguments to support her claim that the provisions of Title VII apply to and were violated by the decision of King & Spalding to deny her promotion to partnership in the firm on account of her sex.

Entity Theory—If King & Spalding were organized as a professional corporation, rather than as a partnership, there would be no doubt that its partner-shareholders would be considered "employees" of the firm for Title VII purposes. Discrimination by a professional corporation in the selection of lawyers for advancement from the "associate" status to that of a "shareholder" is prohibited by Title VII. *Cf. Bonilla v. Oakland Scavenger Co.*, 697 F. 2d 1297 (9th Cir. 1982).

Although King & Spalding is nominally organized as a partnership rather than a professional corporation, it should not be treated differently for Title VII purposes. Large law partnerships "possess many attributes common to corporate forms of business." 678 F. 2d at 1026. In *Bellis v. United States*, 417 U. S. 85, 93-94, 95 (1974), this Court emphasized that "Wall Street law firms . . . are often large, impersonal, highly structured enterprises of essentially perpetual duration" and that even a small law firm with as few as three partners had "an established institutional identity independent of its individual partners."

The conclusion that partnerships should be treated on a parity with corporations for Title VII purposes is reinforced in this case by the fact that King & Spalding has a written partnership agreement. This agreement serves the same function as a corporate charter by eliminating the common-law rules of partnership and replacing them with four principal attributes of incorporation, including (1) a trade name, (2) perpetual existence, (3) centralized management, and (4) limited ownership by partners of firm assets. *Cf. Bellis v. United States*, 417 U. S. at 96 n. 4.

The economic reality of the relationship between a lawyer and a large law firm is primarily one of employment. The professional duties of a lawyer in a large firm are essentially the same whether the lawyer is a "partner" or an "associate." In either case, the lawyer earns a livelihood by performing professional services for clients of the firm. The clients pay the firm for these services and the lawyer is compensated by the firm.

Although a partner is a nominal "owner" of the firm, "there is nothing inherently inconsistent between the coexistence between a proprietary and an employment relationship." *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U. S. at 32. A partner's income from a law firm is ordinary income earned as compensation for individual labors on behalf of the firm and its clients, not as a return on invested capital. A partner in a law firm cannot, for example, increase his share of firm profits simply by increasing the size of his capital account. Moreover, many firms, including King & Spalding, limit a partner's ownership in firm assets on retirement or withdrawal to a portion of that partner's capital account.

It is also irrelevant that partnership positions in King & Spalding are filled by "election" rather than by appointment. *EEOC v. First Catholic Slovak Ladies Association*, 694 F. 2d 1068 (6th Cir. 1982); *Pettway v. American Cast Iron Pipe Co.*, 494 F. 2d 211 (5th Cir. 1974).

Employment Opportunity Theory—In addition to alleging that "partnership" is an employment relationship covered by Title VII, the complaint also alleged (and the answer admitted) that King & Spalding represented to petitioner, and to other young law graduates whom the firm was seeking to recruit, that each associate would be fairly considered for partnership after five or six years of satisfactory employment by the firm. These representations of fair and equal consideration for partnership were

material inducements to petitioner's decision to accept employment as an associate with King & Spalding. By making these representations, King & Spalding made "fair and equal consideration" for partnership both an employment opportunity and a "term, condition and privilege of [her] employment" which petitioner possessed by reason of her employment with King & Spalding as an associate.

"Making partner" represents a promotion from the entry level position of an "associate" to the more-highly compensated and prestigious position of a "partner." Partnership in a law firm is therefore an employment opportunity.

Partnership in a law firm is also a "term, condition and privilege" of employment. *NLRB v. Bell Aircraft Corp.*, 206 F. 2d 235, 237 (2d Cir. 1953) (An employee's "prospects for promotion [are] among the conditions of his employment.") It makes no difference whether promotion would have been to a position that is outside the coverage of Title VII. *Golden State Bottling Co. v. NLRB*, 414 U. S. 168, 188 (1973); *Lucido v. Cravath, Swaine & Moore, supra.* This is especially true in firms like King & Spalding that have "up-or-out" policies, which make attainment of partnership a condition of continued employment. Only partners are allowed to remain with the firm and continue working for (*i. e.*, "representing") clients of the firm instead of being terminated and forced to look elsewhere for professional employment.

Assuming *arguendo* that the relationship between a junior partner and a large law firm is not an "employment relationship" that is itself covered by Title VII, the *opportunity* of being promoted to partnership which King & Spalding held out to all of its associates was a "term, condition or privilege of [the petitioner's] employment" within the meaning of § 703(a) of Title VII, and also an "employment opportunity" covered by the Act.

Termination Theory — The petitioner has also advanced a third claim of wrongful termination resulting from King & Spalding's discriminatory refusal to admit her to partnership under the firm's automatic "up-or-out" policy.

The complaint alleged (and King & Spalding has admitted) that when King & Spalding refused to admit petitioner to partnership because of her sex, this decision resulted automatically in the termination of her employment as an associate under an "up-or-out policy." The complaint expressly alleged that the petitioner's employment as an associate was terminated as a direct result of King & Spalding's decision to refuse to make her a partner in the firm, and that sex was a major factor in its decision. Accepting the allegations of the complaint as true, the effect of such discrimination was automatically to terminate Ms. Hishon's employment as an associate and to "deprive [her] of employment opportunities or otherwise adversely affect [her] status as an employee" of King & Spalding, clear violations of § 703(a) of Title VII. *Lucido v. Cravath, Swaine & Moore, supra.*

The complaint, therefore, stated a claim against King & Spalding for sex discrimination in employment in violation of Title VII and should not have been dismissed for want of subject-matter jurisdiction.

ARGUMENT

I. The Refusal to Apply Title VII to Partnerships Would Be a Significant Blow to the National Goal of Eradicating Job Discrimination.

A. Law Partnerships Are Big Business and Represent Significant Job Opportunities in the Legal Profession.

Partnerships are not outmoded forms of business enterprises suitable only for cottage industries and small family businesses. This Court has recognized that "[s]ome of the most powerful private institutions in the Nation are

conducted in partnership form. Wall Street law firms and stock brokerage firms provide significant examples." *Bellis v. United States*, 417 U. S. 85, 93-94 (1974).[6]

Partnerships occupy a significant segment of the economy and provide a large number of the job opportunities in the United States. In 1979, for example, there were 1,300,000 partnerships in the United States with total revenues of $252.9 billion. U. S. Bureau of the Census, Statistical Abstract of the United States 1982-83, at 528, Table 876 (103 ed. 1983) (hereinafter cited as "Statistical Abstract").

In 1977, the legal profession was a $14.4 billion industry employing 541,000 people; $10.09 billion of the total was received by 29,200 partnerships which employed 197,800 people. Statistical Abstract, 185, 800-01, Tables 311, 1435, 1436. By 1981, the legal profession had grown to a $23.4 billion industry and employed 684,000 people as partners, associates and in secretarial and clerical capacities. Statistical Abstract, 800-01, Tables 1435, 1436.

The major law firms in the United States represent centers of economic and political power far out of proportion to their numbers or their contributions to the GNP. *See Bellis v. United States, supra;* J. Goulden, *The Superlawyers* (1972); P. Hoffman, *Lions in the Street* (1973). King & Spalding's well-publicized connections during the Carter Administration were typical of the influence wield-

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[6]The Big Eight accounting firms are also organized as partnerships. In 1981, the largest in terms of number of partners (Coopers & Lybrand) had 2,010 partners worldwide and revenues of $998 million. The smallest of the Big Eight (Arthur Andersen & Co.) had 1,400 partners and estimated revenues in excess of $973 million. *See* Wayne, *The Year of the Accountant*, N. Y. Times, Jan. 3, 1982, § 3 at 1, col. 2.

ed in Washington, and in state capitals throughout the Nation, by many other large institutional law firms.[7]

In 1982, the law firms included in the National Law Journal's list of the Top 200 law firms employed a total of 28,836 lawyers as partners (12,153) and associates (16,683). These firms ranged in size from Chicago's Baker & McKenzie, which had 236 partners and 377 associates, and operated 28 offices in the United States and in foreign countries, to Boston's Herrick & Smith, which had 80 lawyers. *The Top 200 Law Firms,* National Law Journal, September 13, 1982, at 14, 16, 18-19; September 20, 1982, at 13-16. In 1979, King & Spalding ranked 97th, in 1980 106th, in 1981 98th, and 1982 115th among the Top 200 law firms in total numbers of lawyers. *Id.*; National Law Journal, October 6, 1980, at 32-37; October 13, 1980, at 34-38.

Furthermore, the Top 200 law firms are big businesses relative to the size of most other businesses that are covered by Title VII. For example, King & Spalding had more lawyers in 1980 (102) than 98% of all business "establishments" in the United States had employees.[8] King & Spalding also had more lawyers than 92% of the business "establishments" in the United States meeting the

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[7]King & Spalding partners Griffin Bell and Jack Watson served as Attorney General and as Chief of the White House staff, respectively, during the Carter Administration, while Charles Kirbo, another King & Spalding partner, served in an unofficial capacity as "first friend" of the President. *The First Friend,* Newsweek, Jan. 24, 1977, at 24 (". . . King & Spalding, a Southern gentlemanly law firm in Atlanta . . ."). *See also* Reuters Ltd., Dateline: Atlanta, June 19, 1979 (". . . King & Spalding, one of the best connected law firms in the country . . ."; "King & Spalding, with 107 lawyers, is not the city's largest firm, but its corporate and social ties are perhaps the most venerable.").

[8]U. S. Dept. of Commerce, Bureau of Census, *County Business Patterns—United States,* Table 1B—United States—Establishments, Employees and Payroll by Industry by Employment—Size Class: 1977.

"size of business" test of Title VII had employees. *Id.* Even if only the number of associates employed by King & Spalding (50+) is considered, King & Spalding was still larger than 77% of the business "establishments" in the United States covered by Title VII. *Id.*

B. Employment Discrimination Against Women and Minorities is a Serious Problem in the Legal Profession, Deeply Rooted in its History.

Discrimination against women, blacks, Jews and other minorities has been a persistent part of our nation's history. Despite its motto, "Equal Justice Under Law," the legal profession has not been exempt from discrimination. Although Portia was immortalized by Shakespeare in *The Merchant of Venice,* Mr. Justice Bradley, in the *Myra Bradwell* case, expressed a less favorable attitude toward women lawyers that has continued to prevail more than a century later. In upholding the power of the State of Illinois to refuse to admit women to the practice of law, Mr. Justice Bradley stated in a concurring opinion:

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong or should belong to the family institution, is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . . This very incapacity was one circumstance which the supreme court of Illinois deemed important in rendering a married woman incompetent fully to perform

> the duties and trusts that belong to the office of an attorney and counselor.
>
> It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.
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> *Bradwell v. Illinois*, 83 U. S. 130, 141 (1873).

While the legal obstacles to the admission of women to the bar have been removed, the attitude that women were "incompetent . . . to perform the duties and trusts that belong to the office of an attorney" has remained a formidable obstacle to the advancement of women in the legal profession. Seventy years after *Myra Bradwell*, Judge Phyllis Kravitch, now a member of the Eleventh Circuit, found large law firms to be closed to women lawyers:

> After graduating from the University of Pennsylvania Law School in 1943, one of two women in the class, she was lucky to find a place to practice law—her father's firm in Savannah. At the time, most law firms didn't hire women—not even good students like Judge Kravitch, who had been on the editorial board of the school's law review. Prestigious judicial clerkships were also closed to women then. "When I started practicing law," says Judge Kravitch, "the doors were not only closed, they were locked."
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> Goolrick, *Equality Under the Law?*, Atlanta J. & Const., June 8, 1980 (Atlanta Weekly Magazine), at 16, col. 3.[9]

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[9]It is no secret that many of the large law firms throughout the United States have been historic bastions of overt discrimination in the employment of women, Jews, blacks and other minorities. *See* C. Epstein, *Women in Law* 82 (1981); P. Hoffman, *Lions in the Street* 11-12 (1973).

As recently as 1950, such prestigious law schools as Harvard did not admit women. C. Epstein, *Women in Law* 50 (1981). Notre Dame law school did not admit women until 1969. Washington and Lee did not do so until 1972. *Id.*

Mr. Justice Bradley to the contrary, the objective data demonstrate that women as a group are as well qualified as men, intellectually and academically, to practice law. A 1972 survey of eight leading law schools found that 53% of the women, and only 35% of the men, enrolled in law school graduated in the top 10% of their undergraduate classes. Stevens, *Law Schools and Law Students*, 59 Va. L. Rev. 572 (1973). A study of LSAT scores reflects that during each year from 1969-73, median LSAT scores of women were consistently *higher* than those of their male counterparts. L. Wightman, *Male-Female LSAT Candidate Study 1969-73*, Educational Testing Service (1974). *See also* C. Epstein, *Women in Law* 56-57 (1981); Barber, *Employment Discrimination Against Women Lawyers*, 59 A.B.A.J. 1029 (Sept. 1973).

The enactment of Title VII marked a turning point in the employment of women in the legal profession. In 1964, there were fewer than 2,200 women (4%) enrolled in accredited law schools. Only 367 women received law degrees in 1965. Statistical Abstract, 168, Table 279. Ten years later, the number of women law students had increased ten-fold to 21,788 and the number of women receiving law degrees increased by 1200% from 367 in 1965 to 4,415 in 1975. In the next five years from 1975 to 1980, the number of women graduating from law schools more than doubled to 10,754. Statistical Abstract, 168, Table 279. By 1981, the number of women studying law had grown to 44,986 or 35% of the total law school enrollments. Association of American Law Schools, *Prelaw Handbook 1982-83*, at 11 (1982).

Despite the objective evidence that women are as well qualified as men to practice law, the attitude expressed by Mr. Justice Bradley persists, and lawyers have been slow to recognize the applicability of Title VII to the legal profession.[10] Although lawyers have long counselled their clients to comply with Title VII, job opportunities for women in the legal profession trailed far behind those of their male counterparts.

Women comprised only 3.8% of the total number of lawyers and judges employed in 1972, eight years after the enactment of Title VII. Statistical Abstract, 388, Table 651. In that year, Ms. Hishon was hired by King & Spalding as only the second female lawyer in that firm's almost 100-year history, and the first since the enactment of Title VII.

Martindale-Hubbell reflects that the first woman employed by King & Spalding was Ms. Antha Mulkey, an honor graduate of the University of Georgia Law School, who was employed as an associate in 1944. Although Ms. Mulkey was sufficiently well qualified to meet King & Spalding's standards for the practice of law—she was employed as an associate for 33 years—she was never admitted to partnership. While she remained as the firm's only permanent associate, more than 50 men who were her juniors were promoted into the partnership.[11]

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[10]Lawyers were equally slow to recognize the applicability of the Sherman Act to the legal profession. *See Goldfarb v. Virginia State Bar*, 421 U. S. 773 (1975). *Cf. Bates v. State Bar of Arizona*, 433 U. S. 350 (1977).

[11]Not all minority-group members were as fortunate as Ms. Mulkey. When Morris Abram returned to Atlanta, after graduating with honors from the University of Georgia and the University of Chicago Law School, and having earned a Rhodes Scholarship, he applied to the firm that was then known as Spalding, Sibley & Troutman and discovered "the awful and inescapable reality that no Jew had ever been employed by that firm, now the renowned King & Spalding of Griffin Bell and Charles Kirbo." M. Abram, *The Day is Short* 62, 95 (1982).

In 1974 and 1975, the Second Circuit and the Southern District of New York upheld sex discrimination claims filed by women lawyers against Wall Street law firms that, like King & Spalding, were organized as partnerships. *Kohn v. Royall, Koegel & Wells,* 496 F. 2d 1094 (2d Cir. 1974); *Blank v. Sullivan & Cromwell,* 418 F. Supp. 1 (S. D. N. Y. 1975). As a result of these decisions, employment of women as associates by law firms has accelerated. Over the nine-year period from 1972 through 1981, the number of women employed in the legal profession as lawyers and judges increased more than three-fold from 3.8% in 1972 to 14.1%. Statistical Abstract, 388, Table 651.

Although Title VII has expanded the entry-level job opportunities for women as associates in law firms, the coveted upper-echelon positions of "partner" in many law firms remain closed to women or are available only on discriminatory terms to the exceptional "Superwoman." C. Epstein, *Women in Law* 53 (1981). As recently as 1979, for example, 90 of the Top 200 law firms (including King & Spalding) had no women partners; 67 other firms on the Top 200 list had only one. C. Epstein, *Women in Law* 175-218 (1981); Epstein, *The Partnership Push,* SAVVY, March 1980, at 29, 35.[12]

A 1982 survey of 151 law firms reflects that there were no women partners in 32 firms, no black partners in 106, and no Hispanic partners in 133 firms. Flaherty, *Women & Minorities: The Gains,* National Law Journal, December 20, 1982, at 1, 8-11. These 151 law firms employed 5% of the lawyers in the entire Nation. This same survey reflects that in June 1982, King & Spalding had only one woman partner, and no black or Hispanic partners. Al-

[12]This historical pattern of discrimination is by no means limited to women. One author has noted that there has been a tendency among Wall Street law firms to hire blacks "only for display purposes or for corporate 'minority affairs,' *i. e.,* contacts with other blacks." C. Clark, *Minority Opportunities in Law for Blacks, Puerto Ricans & Chicanos* 5 (1974).

though women represented more than 30% of those graduating from law schools in 1980 [Statistical Abstract, 168, Table 279], only 7 (13%) of King & Spalding's 53 associates were women. King & Spalding had only one associate who was black (2%), and no Hispanic associates. *Id.* at 10.

These statistics demonstrate that the issue presented in this case is not an isolated act of discrimination by a law firm against a single individual, but is representative of a historical pattern of discrimination that exists in large numbers throughout the Country. Although not by design, this case has become a test case of the rights not only of women, but also of blacks, Jews and other minorities that have historically been excluded from the most highly compensated, prestigious and responsible job opportunities in the private practice of law.

The ultimate issue presented by this appeal can be simply stated:

> Can King & Spalding, or any other law firm that has 15 or more employees, post a sign on the door of its partnership meetings that reads:
>
> KEEP OUT
>
> NO WOMEN, NO BLACKS, NO JEWS ADMITTED

Petitioner believes that the only answer permitted by Title VII to this question is an emphatic "NO" and that the ruling of the court of appeals must be reversed.

II. Because the Complaint was Dismissed for Want of Subject-Matter Jurisdiction, the Judgment Below Must Be Reversed "Unless it Appears Beyond Doubt that the Plaintiff Can Prove No Set of Facts in Support of [Her] Claim" that Sex Discrimination by Law Firms in the Selection of Partners Is Prohibited by Title VII.

In *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 246 (1980), this Court held that the same standards of review apply whether a complaint is dis-

missed under Rule 12(b)(1) for want of subject-matter jurisdiction or for failure to state a claim under Rule 12(b)(6). Such dismissals are not favored and must be reversed "unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief.'" *Id.* at 246 (quoting *Conley v. Gibson*, 355 U. S. 41, 45-46 (1957)).

The judgment below can be affirmed only if there are *no* circumstances under which the discrimination by *any* law firm that is organized as a partnership in the selection of partners can be found to be covered by Title VII. This is especially true in this case, in which the district court not only sustained a facial attack on the complaint, but refused to allow petitioner to obtain relevant discovery concerning the internal structure and operation of King & Spalding to support her claim concerning the coverage of Title VII.

The complaint stated a claim for sex discrimination under Title VII and should not have been dismissed.

III. Discrimination by Law Firms in the Selection of Partners and the Discharge of Those Associates who Fail to Make Partner Because of Sex, Race, Religion, or National Origin, Are "Unlawful Employment Practices" that Are Prohibited by § 703 (a)(1) and (2) of Title VII.

There is no dispute that King & Spalding is a "person" whose employment practices are covered by Title VII. Section 701(a) expressly defines "the term 'person' [to] include . . . partnerships." Nor is there any doubt that King & Spalding is an "employer," is engaged in the practice of law in "an industry affecting commerce" [*see McLain v. Real Estate Board of New Orleans, Inc., supra; Goldfarb v. Virginia State Bar, supra*], and has "fifteen or more employees" and, therefore, meets the size of business test of coverage of Title VII. 42 U. S. C. § 2000e (b).

There is no "professional exemption" that removes lawyers from Title VII, any more than there is a profes-

sional exemption from the Sherman Act. *Goldfarb v. Virginia State Bar, supra.* An associate of a law firm (such as Ms. Hishon was of King & Spalding from April 1972 until her discharge on December 31, 1979) is an "employee" of the firm for purposes of Title VII. 42 U. S. C. § 2000e(f). *Kohn v. Royall, Koegel & Wells, supra; Blank v. Sullivan & Cromwell, supra; Lucido v. Cravath, Swaine & Moore,* 425 F. Supp. 123 (S. D. N. Y. 1977).

The question presented by this case is not whether King & Spalding is an "employer" covered by Title VII, nor whether Ms. Hishon was an "employee" of King & Spalding who was entitled to the protection of Title VII. These points have never been disputed. Rather, the issue is whether the particular acts of sex discrimination, which were alleged to have been practiced against Ms. Hishon by her employer King & Spalding, were *"unlawful employment practices"* within the meaning of § 703(a) of Title VII.

As will be explained in Sections C. 1, C. 2, and D below, sex discrimination by law firms is an unlawful "employment practice" under each of three legal theories: (1) A large partnership is an entity having an identity separate from its individual partners and can be considered an employer of a partner for Title VII purposes; (2) promotion to partnership is a "term, condition or privilege of employment" or an "employment opportunity;" and (3) petitioner's discharge as an associate was the direct result of the discriminatory refusal to promote her to partnership.[13]

A. Title VII is to be Liberally Construed, and Exceptions Are Not to be Read into the Statute Without Clear Congressional Intent.

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[13]Before these three theories are developed in Sections C and D below, two preliminary points must be made. The first concerns the construction of Title VII (Section A), and the second, the definition of "employee" (Section B).

This Court has held that "in enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit *all practices* in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin, [citations] and ordained that its policy of outlawing such discrimination should have the 'highest priority.'" *Franks v. Bowman Transportation Co.*, 424 U. S. 747, 763 (1976). There is no doubt that Congress intended to outlaw discrimination in the professions. This Court has recently emphasized that "Congress required 'the removal of artificial, arbitrary, and unnecessary barriers to employment' and *professional development* that had historically been encountered by women, blacks and other minorities." *Connecticut v. Teal*, 50 U.S.L.W. 4716 (June 21, 1982) (No. 80-2147) (emphasis supplied).

This Court has held that "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Andrus v. Glover Construction Co.*, 446 U. S. 608, 616-17 (1980); *Continental Casualty Co. v. United States*, 314 U. S. 527, 533 (1942).

When Congress has intended to exempt certain organizations from Title VII, it has done so by specific exceptions in the statute. For example, Congress exempted employers having fewer than fifteen employees [§ 701(b)], private clubs [§ 701(b)(2)], and persons elected to public office [§ 701(f)] from Title VII's prohibitions against employment discrimination. There is no evidence, however, that Congress intended to exempt partnerships in general or law firms in particular from the coverage of Title VII, and no such exemptions should be implied.

The approach of the court of appeals to the interpretation of Title VII was the opposite of that mandated by

the decisions of this Court. Instead of presuming coverage from the absence of an express statutory exemption for law firms, the majority placed the burden on the petitioner of demonstrating from the legislative history that Congress discussed the subject of discrimination by law firms and other partnerships and specifically intended to cover partnership decisions. Finding an absence of positive evidence of "the *requisite* congressional intent" [678 F. 2d at 1026 (emphasis supplied)], the lower court presumed that Congress intended to leave discrimination in the selection of partners by law partnerships and other "voluntary associations" untouched by Title VII's otherwise comprehensive prohibitions against discrimination in the workplace. The lower court disregarded the teaching of *County of Washington v. Gunther*, 452 U. S. 161 (1981), in which this Court explained that, because Title VII was "intended to be broadly inclusive" [*id.* at 170], the lower federal courts "must therefore *avoid interpretations* of Title VII that deprive victims of discrimination of a remedy, *without clear congressional mandate.*" *Id.* at 178 (emphasis supplied).

B. Economic Reality and Not Common-Law Definitions Determines Whether a "Partner" is an "Employee" of the Firm for Purposes of Title VII.

Title VII defines an "employee" simply as a "person employed by an employer." § 701(f) (42 U. S. C. § 2000e (f)). Although the term "employment" is not explicitly defined in Title VII, it has a well-established common meaning that encompasses the means by which one earns a livelihood. Thus, "employment" is defined in *Webster's Third New International Dictionary* 743 (3d ed. 1976), as an "activity in which one engages and employs his time and energies . . . [for example] *work* (as customary trade, craft, *service* or vocation) *in which one's labor or services are paid for* by an employer." (emphasis supplied.) "Employ" means "to use or engage the services of (a lawyer to

straighten out a legal tangle); also: *to provide with a job* that pays wages or a salary or *with a means of earning a living.*" *Id.* (emphasis supplied).

It does not demean the legal profession to describe the practice of law by lawyers for large law firms as "work" or a "job." Whether a lawyer is a partner or an associate in a law firm, the practice of law involves the performance of personal services of a professional nature by the individual lawyer. As this Court observed in *Bates v. State Bar of Arizona*, it is a "real-life fact that lawyers earn their livelihood at the bar." 433 U.S. at 368. In the case of a sole practitioner, the lawyer earns a livelihood by representing and performing professional services for individual clients. In the case of a lawyer who works for a law firm, the lawyer earns a livelihood by working for clients of the firm, either as a partner or an associate. The labor by which the lawyer earns a livelihood by performing professional services for clients of a firm is, therefore, well within the common, everyday meaning of "employment."

King & Spalding argues that at common law a partnership and its partners were considered as a single entity. Based on this premise, King & Spalding would have the Court conclude that a partner in a large law firm with 50 or even 100 partners—or in the case of a Big Eight accounting firm with as many as 2,000 partners—cannot be considered as an "employee" of the partnership for purposes of Title VII.

Congress did not, however, intend to restrict Title VII's otherwise comprehensive ban on employment discrimination based on narrow common-law concepts of "employment." By enacting Title VII without explicit definitions of "employee" or "employment," Congress intended to use these terms in the same manner as it had used them in the National Labor Relations Act, the Social Se-

curity Act, and the Fair Labor Standards Act. In all three statutes, Congress used the terms "employer," "employee" and "employment" with only the most general definitions or without any definitions at all. Congress was undoubtedly aware, however, that this Court had interpreted the term "employment" in each of these statutes very broadly by looking at the economic reality of a particular relationship, and had rejected attempts to narrow the coverage of those Acts through the use of more restrictive common-law definitions of an "employee." *NLRB v. Hearst Publications*, 322 U. S. 111 (1944) (National Labor Relations Act), *United States v. Silk*, 331 U. S. 704 (1947) (Social Security Act), and *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U. S. 28 (1961) (Fair Labor Standards Act).

In the first of these cases, *NLRB v. Hearst Publications*, this Court established the rationale that was followed in subsequent cases in defining the term "employee" in both the Social Security Act and the Fair Labor Standards Act:

> Congress recognized that economic relationships cannot be fitted neatly into the containers designated "employee" and "employer" which an earlier law had shaped for different purposes . . .
>
> • • •
>
> In this light, the broad language of the Act's definitions, which in terms reject conventional limitations on such conceptions as "employee," "employer," and "labor dispute," leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications.

322 U. S. at 128-29.

Goldberg v. Whitaker House Cooperative [Fair Labor Standards Act] was decided only three years before the passage of Title VII. This Court held that an "owner"

of an enterprise could also be considered an "employee" where the economic reality of the relationship was such that she worked for the enterprise. The Court explained that "ownership" and "employee" status were not mutually exclusive, and that:

> There is nothing inherently inconsistent between the coexistence of a proprietary and an employment relationship. If members of a trade union bought stock in their corporate employer, they would not cease to be employees within the conception of this Act. . . . We fail to see why a member of a cooperative may not also be an employee of the cooperative. In this case the members seem to us to be both "members" and "employees." It is the cooperative that is affording them "the opportunity to work, and paying them for it," . . .
>
> 366 U. S. at 32-33.

This Court has stated that "it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts and that it expected its enactment to be interpreted in conformity with them." *Cannon v. University of Chicago*, 441 U. S. 677, 699 (1979). *See also Hargrove v. Oki Nursery, Inc.*, 646 F. 2d 716, 720 (2d Cir. 1980) ("Use of the same language in various enactments dealing with the same general subject matter, . . . [*i. e.*, employment] is a strong indication that the statutes should be interpreted to mean the same thing").

There can be no doubt, therefore, that in enacting Title VII, Congress intended that the term "employee" be interpreted broadly and to reject artificial, common-law concepts of employment in favor of a realistic appraisal of the "underlying economic facts" of a particular relationship. *NLRB v. Hearst Publications, supra.*

C. Discrimination by a Law Firm In the Selection of Partners from Among Its Associates Based on Race, Religion, Sex or National Origin, Violates Title VII.

Title VII coverage of sex discrimination practiced by law firms in the selection of partners from among their associates exists under two distinct legal theories: (1) an "entity theory" under which the partnership is treated as the "employer" of its partners, and (2) an "employment opportunity" theory under which to "make partner" is both an "employment opportunity" and a "term, condition or privilege" of a young lawyer's employment as an associate of a large law firm.[14]

1. The Entity Theory

(a) A large law partnership is an entity that has an institutional identity separate from that of its individual partners and can be considered as the "employer" of a partner for Title VII purposes.

The crux of King & Spalding's position in the district court was that "the firm" and its partners are a single entity and that a "partner" is an owner and cannot be separated from "the firm" or considered an "employee" of "the firm" for purposes of Title VII. These artificial and legalistic distinctions ignore the economic reality of the relationship between an individual partner and a large institutional law firm. A partner, and particularly a junior partner, in many large law firms is in reality a "profit-sharing employee." *City of Wheeling v. Chester*, 134 F. 2d 759, 762 (3d Cir. 1943). *See Armstrong v. Phinney*, 394 F. 2d 661 (5th Cir. 1968) (applying an entity theory to hold a partnership to be the "employer" of a 5% partner for tax purposes).[15] Partnership in a law firm has the primary attributes of employment. Partnership is a job opportunity which enables a lawyer to earn a living by performing professional services for firm clients. The income from the job ends when the partner stops working

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[14]The termination of associates under an up-or-out policy will be discussed in Section D below.

[15]Several well-known law firms have "fired" partners. *See, e. g., Bad Day at Kutak Rock*, National Law Journal, November 2, 1981 at 1, col. 2.

for the firm. Partnership in a law firm is primarily a job opportunity which is readily distinguishable from real estate and other investment partnerships which generate income for partners, not from personal services, but as a return on invested capital.

The authors of a leading textbook on partnerships could have been referring to King & Spalding when they stressed that:

> [N]o corporation is more entity-like than a large law or accounting firm which has been going for generations, often under the name of someone long since dead, with dozens or hundreds of partners (of whom only a handful, as managing partners or an executive committee, make major decisions) . . .
>
> J. Crane and A. Bromberg, *Law of Partnership* 19-20 (1968).

This Court has recognized that "Wall Street law firms . . . are often large, impersonal, highly structured enterprises of essentially perpetual duration," and that even a small law firm with as few as three partners has "an established institutional identity *independent* of its individual partners." *Bellis v. United States*, 417 U.S. at 93-94, 95 (1974) (emphasis supplied). Even the majority in the court of appeals in this case was "well aware that large law partnerships possess many attributes common to corporate forms of business." 678 F. 2d at 1026.

In *Bellis*, this Court enforced a grand jury subpoena which had been served upon a former partner of a small three-partner law firm requiring his production of records of the former partnership (which had been dissolved). This Court rejected Bellis' assertion of the Fifth Amendment privilege against self-incrimination based on his contention that the law firm and its partners were a single entity, and that the business records of the partnership were, therefore, his personal records and protected by the privilege.

In reaching this conclusion, this Court refused to be influenced by technical common-law definitions of the relationship between a partnership and its partners. The Court recognized that the partnership form is, in economic reality, only one of many forms under which business enterprises are conducted, and emphasized *six common attributes* of partnerships and corporations which require that the two organizational forms be treated equally for Fifth Amendment purposes:

(1) That partnerships, like corporations "are often large, impersonal, highly structured enterprises. . . ."

(2) That the particular partnership had been in existence for 15 years and had "essentially perpetual duration."

(3) That the partnership had an "established institutional identity independent of its individual partners," resulting from the fact that, "[t]he firm maintained a bank account in the partnership name, had stationery using the firm name on its letterhead, and, in general, held itself out to third parties as an entity with an independent institutional identity . . ."

(4) That the partnership "employed six persons in addition to its partners, including two other attorneys [*i. e.*, 'associates'] who practiced law on behalf of the firm, rather than as individuals on their own behalf."

(5) That the firm "filed separate partnership returns for federal tax purposes, as required by § 6031 of the Internal Revenue Code, 26 U. S. C. § 6031."

(6) That "State law permitted the firm to be sued . . . in the partnership name, and generally regarded the partnership as a distinct entity for numerous other purposes."

Bellis v. United States, 417 U. S. at 93-97 (emphasis supplied).

These factors apply with much greater force to King & Spalding than to the dissolved three-man law firm of Bellis, Kolsby & Wolf. King & Spalding is a "large, impersonal and highly structured enterprise" with more than 100 lawyers and more than 50 other employees in

secretarial, paralegal and clerical positions, and offices in two cities. During the recent past, the ties between King & Spalding and the Carter Administration were widely publicized, and the firm was recognized as one "of the most powerful institutions in the Nation." King & Spalding has had, in fact, an "essentially perpetual duration" that has extended for almost 100 years; King & Spalding has established for itself an "institutional identity" by holding itself out to the public as practicing law under a trade name, "King & Spalding," which is the name under which the firm was founded in 1885. R. 161; J.A. 153.

(b) King & Spalding's partnership agreement modifies state law to give King & Spalding the essential attributes of incorporation.

A factor present in this case and not present in *Bellis* is the fact that King & Spalding operates under a written partnership agreement that modifies the common law of partnership and gives King & Spalding the principal attributes of incorporation.

A copy of King & Spalding's partnership agreement is in the record (R. 161-72; J.A. 153-64) and was relied on by the petitioner in the district court in support of her Rule 37 motion to compel discovery. R. 159; J.A. 151. King & Spalding's partnership agreement modified the general principles of partnership law in at least five material respects, and replaced them with the principal attributes of ordinary business corporations. As a result of these changes, King & Spalding is a "partnership" in name only, and has all the substantive characteristics of a corporation.

First—King & Spalding has a "charter." While many law firms function under the common law of partnership without written agreements, King & Spalding has adopted a written partnership agreement which modifies the common law and serves the same purposes that a corporate charter serves for a corporation.

In *Bellis,* this Court treated the three-man law firm as a corporation for Fifth Amendment purposes, despite the fact that the firm did not have a written partnership agreement to serve as "a formal constitution or bylaws to govern its internal affairs." 417 U. S. at 96. The Court stressed, however, that the case for treating the law firm as a corporation would have been even stronger if the Bellis firm had operated under a written partnership agreement that "made any material change in the provisions of state law regarding the management and control of the firm or the rights of the other partners. . . . [That fact] would merely reinforce our conclusion that the partnership is properly regarded as an independent entity with a relatively formal organization." 417 U. S. at 96 n. 4.

Second — King & Spalding has perpetual existence. King & Spalding has distinguished itself from a common-law partnership by providing in its partnership agreement that the firm shall have perpetual existence. The agreement recites that "the Firm" has had a continuing existence since 1885, and that its existence is not dissolved by the admission of new partners or the death, withdrawal or expulsion of any of its partners.

> **This firm began business January 1, 1885 under the firm name of King & Spalding . . . and currently the present firm name.**
>
> • • •
>
> **(a) The firm shall continue until dissolved by vote of partners with at least 66-2/3% of the participating units . . . *The firm shall not be dissolved by the withdrawal, incapacity or death of any partner or partners,* . . .**
>
> **R. 161-62; J.A. 153-54 (emphasis supplied).**

In contrast, a common-law partnership is dissolved automatically by the addition, withdrawal or death of one of its partners. O.C.G.A. § 14-8-90 (Ga. Code Ann. § 75-107); *Harwell v. Cowan*, 175 Ga. 33 (1), 165 S. E. 2d 19 (1932).

Third — King & Spalding does business under a trade name. King & Spalding is a trade name that does not refer to any of its living partners. The adoption of a trade name has given the firm an institutional identity that is independent of the individual reputations of the many well-known lawyers who are presently associated with it. Use of a trade name protects the goodwill of the firm against impairment by death and retirement, or the defection of any of its well-known partners to other law firms. Corporations have long recognized the advantages of trade names. Names like "General Motors" or "Coca-Cola" have given these enterprises an identity and continuity apart from the names of individuals who founded them or happened to be their dominant corporate officers or principal stockholders at any given time. By its deliberate use of a trade name, the partnership is attempting to establish and identify itself as the Coca-Cola or General Motors among law firms in Atlanta, if not nationally.

Fourth — King & Spalding has centralized management and control. Management of King & Spalding is vested in a Management Committee which is elected by the partners in substantially the same manner as shareholders of a corporation elect directors. The King & Spalding Management Committee also performs the same functions that a board of directors performs in an ordinary business corporation. While the King & Spalding Management Committee cannot alter the firm partnership agreement (any more than the directors of a corporation can amend its charter), the Management Committee's actions are otherwise binding on the firm unless overridden by a 66-2/3 vote of the partners:

> The management of the firm shall be delegated to a Management Committee comprised of three partners . . . *To the Management Committee the partners delegate full and complete authority and responsibility to make any and all decisions, commitments and contracts with respect to the operation and manage-*

ment of the firm, provided, however, the Management Committee shall not have authority to act in a manner which would require a change in this Partnership Agreement for its accomplishment or implementation. ...*No action taken by the Management Committee may be reversed or changed except by an affirmative vote of partners with 66-2/3% or more of the participating units.*

Partnership Agreement ¶ 14; R. 170-71; J.A. 162-63 (emphasis supplied).

Under common law, partnership decisions are made by a vote of a majority at interest of the partners. O.C.G.A. § 14-8-42 (Ga. Code Ann. § 75-203); *Rogers v. McDonald,* 224 Ga. 599, 163 S. E. 2d 719 (1968).

Fifth — King & Spalding partners do not own a share in the Firm assets. When a lawyer becomes a partner in King & Spalding, he does not acquire a meaningful ownership interest in the underlying firm assets, as does a partner in a common-law partnership. When a King & Spalding partner withdraws or is expelled, he is entitled *only* to a *refund of his invested capital,* and his share of undistributed net earnings.[16] The King & Spalding agreement expressly provides that:

> (a) . . . it is agreed that upon the separation from the firm of any partner, whether by reason of voluntary or involuntary withdrawal or death, his interest in the firm's earnings and assets shall be as follows:
>
> (i) A refund of his cash capital contribution, if the firm's capital is unimpaired (to the extent there is impairment of the firm's capital, such partner shall be refunded only his proportion of unimpaired capital);
>
> (ii) The amount of undistributed net earnings to which he is entitled as shown by the firm's

[16]The only circumstance under which a King & Spalding partner would receive a pro rata share of the underlying assets of the firm would be in the event of a total dissolution.

> records as of the end of the month in which such withdrawal occurs.

Partnership Agreement ¶ 9(a); R. 166-67; J.A. 159.

In contrast, if King & Spalding were a common-law partnership, a withdrawing partner would be entitled to receive a pro rata share of the fair market value of the firm's net assets in excess of its liabilities. O.C.G.A. § 14-8-45 (Ga. Code Ann. § 75-206); *Bryan v. Maddox,* 249 Ga. 762, 295 S.E. 2d 60 (1982). This would include a share of the value of the unbilled time and disbursements, accounts receivable, as well as the value of all leasehold improvements, furniture, fixtures, library, the files, computers and other physical assets.

(c) The fact that a partner in King & Spalding may have a limited "ownership" interest in firm assets or be paid from "profits" does not alter the primary nature of the relationship as one of employment.

King & Spalding argued in the lower courts that because partners are considered as the "owners" of the firm, and are paid from "profits," they cannot be considered as "employees" of the firm for purposes of Title VII. Taken to its logical conclusion, this argument would mean that employees of a corporation would lose the protection of Title VII if they acquired stock under an employee stock ownership plan. This argument is unsound and must be rejected for at least two reasons.

First, the argument ignores the fact that under the terms of the King & Spalding partnership agreement a partner in King & Spalding does not have any meaningful ownership interest in the underlying firm assets. Partnership Agreement ¶ 9(a) (quoted at page 37, *supra;* R. 166-67; J.A. 158-59). When a King & Spalding partner retires, withdraws or is expelled, he is entitled only to a refund of his invested capital, and his share of undistributed net earnings. *Id.*

Second, cases decided by this Court [*Goldberg v. Whitaker House Cooperative, Inc.*, 366 U. S. 28 (1961)], as well as by several lower courts [*Bonilla v. Oakland Scavenger Co.*, 697 F. 2d 1297 (9th Cir. 1982); *EEOC v. First Catholic Slovak Ladies Association*, 694 F. 2d 1068 (6th Cir. 1982); *Pettway v. American Cast Iron Pipe Co.*, 494 F. 2d 211, 264-66 (5th Cir. 1974)] establish that the existence of an ownership interest in a business does not prevent a person from being an "employee" of that business and, therefore, within the protection of federal employment legislation. For example, in *Goldberg v. Whitaker House Cooperative, Inc.*, this Court held that the women who worked at home knitting goods for sale by the cooperative were "employees" of the cooperative for purposes of the Fair Labor Standards Act, notwithstanding the fact that they were also "members" and "owners" of the cooperative. The Court concluded that "[t]here is no reason in logic why these members may not be employees. There is *nothing inherently inconsistent between the coexistence of a proprietary and an employment relationship.*" 366 U. S. at 32 (emphasis supplied).

In *Bonilla v. Oakland Scavenger Co., supra*, the Ninth Circuit held that a membership corporation engaged in the garbage business violated Title VII by giving preference to its stockholders (all of whom were Italian-Americans) in making promotions from "helper" positions to the higher-paid positions as "drivers." The company argued that Title VII did not apply to the exercise of "proprietary rights" by stockholders to promote themselves and their families to higher-paid positions. This argument was rejected by the Ninth Circuit:

> The Company argues that Title VII has no application to discrimination in the sale of corporate stock. Even if this is so, however, it does not help the Company's position here. Since the Company ties preferential wages, hours, and job assignments to ownership of its stock, the shareholder preference plan con-

> stitutes a condition of employment subject to the mandate of Title VII. The Company's organization closely entangles stock ownership and employment privilege, but the predominant characteristics are those of employment. . . . [T]he discriminatory employment practices of the Company are within the reach of Title VII in spite of the effort to characterize those practices as "proprietary rights."
> 697 F. 2d at 1302-03.

In *Pettway v. American Cast Iron Pipe Co., supra,* the Fifth Circuit held that an opportunity to be elected to an "ownership" position in a business which was available only to white male employees and gave them the ability to influence the terms and conditions of their employment was an "employment opportunity" under Title VII that could not be denied black employees. In that case, all of the stock of American Cast Iron Pipe Co. had been conveyed under the will of the company's founder jointly to the members of two committees as trustees for the employees of the company. One committee was called the Board of Management and consisted of corporate officers of the company. The second committee was called the Board of Operatives and consisted of white male employees of the company over 21 years of age elected by non-supervisory employees of the company. The district court held that, although black employees of the company were not "employees" of the Board of Operatives, the opportunity *to be elected* to serve on the Board of Operatives and to influence the management of the company *by voting the shares of stock* held by the Board was so connected with the employment that black employees could not be excluded from becoming trustee-owners of the stock as members of the Board of Operatives. *Pettway v. American Cast Iron Pipe Co.*, 332 F. Supp. 811, 815 (N. D. Ala. 1970). Judge Lynne explained that:

> "[T]he right to serve as a member on the Board of Operatives at Acipco has been, since the inception of

> the Eagan Plan, a valuable term, condition or privilege of employment at Acipco and therefore falls within the express coverage of Title VII, 42 U.S.C.A. 2000e-2(a)."

The court of appeals quoted this portion of the district court's opinion in affirming the ruling of the district court insofar as it had held that black employees could not be denied election to the Board of Operatives. *Pettway v. American Cast Iron Pipe Co.*, 494 F. 2d at 263-64.

In summary, the factors emphasized by this Court in *Bellis* and reinforced by the provisions of the King & Spalding partnership agreement compel the conclusion that "the firm" King & Spalding should be treated as an institution separate from its partners, and as the "employer" of the partners for Title VII purposes. The contrary ruling of the lower court is erroneous and should be reversed.

2. The Opportunity Theory

By holding out to petitioner and to other associates the promise of equal consideration for partnership, King & Spalding made the opportunity of promotion to partnership a "term, condition or privilege" of employment and an "employment opportunity" of its associates that is covered by Title VII.

The complaint alleged that King & Spalding represented to petitioner (and represents generally to other third-year law students and judicial law clerks whom King & Spalding is attempting to recruit) that the associate will be given fair and equal consideration for partnership. Complaint ¶ 8(b), R. 6; J.A. 9-10; Answer ¶ 8(b); R. 26; J.A. 30-31.[17]

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[17]The Court can take judicial notice of the fact that there is vigorous competition among large law firms to employ law students who are at the top of their classes, as was Ms. Hishon. Representations such as those made by King & Spalding to petitioner are essential for any law firm that hopes to recruit bright law students or law clerks. No highly-qualified recruit would accept employment as an associate of even a firm as prestigious as King & Spalding if the firm did not hold out the

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Under the allegations of the complaint, the opportunity of promotion to partnership was not one which King & Spalding held out to the World, but was one which was specifically offered to petitioner by virtue of her status as an associate employed by King & Spalding. Assuming for the sake of argument that partnership in a law firm is not, *per se*, an employment relationship covered by Title VII, by using the prospect of promotion to partnership as an inducement to persuade petitioner and other bright young lawyers to accept employment with the firm and to work hard, King & Spalding has made the opportunity to become a partner both an "employment opportunity" of Ms. Hishon's and other associates and a "term condition or privilege of [Ms. Hishon's] employment" by King & Spalding as an associate, within the coverage of § 703(a) of Title VII, which could not, therefore, be withheld on the basis of sex, race, religion or national origin under Title VII.

An employee's "prospects for promotion [are] among the conditions of his employment." *NLRB v. Bell Aircraft Corp.*, 206 F. 2d 235, 237 (2d Cir. 1953). Even the court of appeals could not "quarrel with the premise that an 'opportunity' can include promotion to a position beyond that of an 'employee' covered by Title VII." 678 F. 2d at 1028.[18]

Furthermore, in the analogous context of employment discrimination in violation of the National Labor Relations Act, this Court has held that, when a promotion is

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prospect of admission to partnership as an inducement. *See, e. g.*, Bower, *A Survival Guide For Associates*, Barrister, Vol. 6, No. 1 (Winter 1979), at 17 ("[a]ttainment of partnership status is a primary motivation for associates. . . .").

[18]The majority below, however, refused to accept the conclusion that Title VII prohibited discrimination in the opportunity to become a partner in a law firm as "encroaching upon individuals' [partners'] decisions to voluntarily associate in a business venture." 678 F. 2d at 1028.

unlawfully denied to an employee who is covered by that Act, the protection of the statute is not lost simply because the position to which the employee would have been promoted (but for the employer's unlawful discrimination) was a "supervisory position" that is outside the coverage of the Act. *Golden State Bottling Co. v. NLRB*, 414 U. S. 168, 188 (1973). In *Golden*, an employee was denied promotion to a supervisory position which was outside the coverage of the NLRA because of his union activities. This Court cited with approval the Second Circuit's decision in *Bell Aircraft* and held that the denial of the promotion based on the employee's union activities violated the Act, even though the position in management of the company was outside the coverage of the Act. The Court quoted with approval the court of appeals, which had stated:

> "The Act's remedies are not thwarted by the fact that an employee who is within the Act's protections when the discrimination occurs would have been promoted or transferred to a position not covered by the Act if he had not been discriminated against. *NLRB v. Bell Aircraft Corp.*, 206 F. 2d 235, 236-237 (2d Cir. 1953)." 467 F. 2d at 166.
>
> 414 U. S. at 188.

In *Lucido v. Cravath, Swaine & Moore, supra*, the district court relied upon this reasoning in refusing to dismiss a Title VII complaint by an associate alleging that he had been denied admission to partnership because of his Italian-Catholic ancestry. Without deciding whether the relationship between partners *inter se* was covered by Title VII, the district court held that the opportunity which Mr. Lucido possessed by virtue of his employment as an associate by Cravath, Swaine & Moore was an "employment opportunity" that was covered by the Act.

> [T]he court need not decide whether Title VII applies to partners *inter se*. However, even assuming that Title VII does not apply to such a relationship, the

protection the Act affords to Lucido for the unlawful discrimination he allegedly suffered as an employee in not being selected for partner solely because he is an Italian Catholic would not be affected. The applicability of Title VII might be different if the defendant were firing a partner or considering a non-associate for partner, but, under the facts in the complaint, *there is a clear employer-employee relationship between Cravath and Lucido and discrimination in a promotional opportunity during that relationship is covered by Title VII.*

The opportunity to be promoted to a position not itself covered by Title VII does not mean that discrimination in that promotion cannot be protected by Title VII.

425 F. Supp. at 128 (emphasis supplied).[19]

King & Spalding has also made partnership "a condition of employment subject to the mandate of Title VII" by tying both Ms. Hishon's continued employment by the

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[19]The opportunity to be considered for partnership is directly affected by the employment opportunities which a young lawyer receives as an associate. The complaint alleged that because she was a woman, King & Spalding treated Ms. Hishon less favorably than male associates by giving her less responsible work assignments (*i. e.*, "woman's work"), which tended to involve smaller matters on which she was required to work alone and without assistance from or being given the opportunity to supervise the work of junior associates. Complaint ¶ 17(d), (e); R. 9; J.A. 13. This discrimination in the quality of work assignments deprived petitioner of the opportunity to demonstrate that she was "partnership material" and tended to make it less likely that she would advance to partnership than King & Spalding's male associates who received better, more responsible work assignments, and plenty of associate help. These were continuing violations of both § 703(a)(1) (*i. e.*, an unlawful discrimination in the "terms, condition or privileges of employment because of . . . sex") and § 703(a)(2) (*i. e.*, an unlawful segregation or classification of employees that tended to "deprive [plaintiff] of employment opportunities or otherwise deliberately affect [her] status as an employee") that adversely impeded her opportunity to be favorably considered for partnership. *Clark v. Olinkraft, Inc.*, 556 F. 2d 1219 (5th Cir. 1977), *cert. denied*, 434 U. S. 1069 (1978).

firm and her advancement to the "preferential wages, hours and job assignments" to attainment of the coveted status of a "partner." *Bonilla v. Oakland Scavenger Co.*, 697 F. 2d at 1302.

The lower court never fully responded to petitioner's contention that King & Spalding's promise of fair consideration for partnership became a "term, condition or privilege" of her employment as an associate. The lower court conceded that it had "serious concerns about any representations made to the appellant regarding her future consideration for partnership" and was "well aware of the significance given a firm's partnership policy by a prospective associate. . . ." 678 F. 2d at 1029. The majority suggested, however, that, "[i]f in fact these representations were deceptively made, then perhaps an action in breach of contract or misrepresentation may provide a more appropriate vehicle for the appellant to drive toward a legal remedy." *Id.* The majority never explained how an express representation of non-discriminatory consideration for partnership could support a contract action by Ms. Hishon as an employee without the promise becoming simultaneously a "term, condition or privilege" of her employment by King & Spalding as an associate.

Pettway and a recent decision of the Sixth Circuit in *EEOC v. First Catholic Slovak Ladies Association, supra*, also dispose of another argument that was relied on by the district court. The district court thought that because partnership positions in King & Spalding were filled by "election," rather than by appointment, they were outside the coverage of the Act.[20] This distinction was rejected

[20]If this were true, many corporate positions would be outside the coverage of Title VII. For example, virtually everyone in a bank from president to assistant cashier is an "officer" and

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by the Sixth Circuit in *First Catholic Slovak Ladies Association*. Under the constitution of the First Catholic Slovak Ladies Association, the salaried officers of the Association were also required to be directors. To be eligible for election as a director, one had to be less than 66 years old. Relying on the ruling of the Eleventh Circuit in *Hishon*, the district court held that the fact of election of directors removed the positions from the coverage of the age discrimination act. The Sixth Circuit reversed and held that:

> [W]hether an individual is an employee and therefore covered by the protections in ADEA should not center on the label which the organization has chosen to give to the position. By emphasizing that these women held elected positions as directors and officers, the District Court failed to assess accurately their true status. These individuals performed traditional employee duties. . . .
>
> 694 F. 2d at 1070.

The teaching of *Pettway* and *First Catholic Slovak* is that when some employees are afforded the opportunity to be elected "owners" or "shareholders" and to participate in the management of the enterprise, the opportunity is both an "employment opportunity" and "a term, condition or privilege of employment" to which Title VII applies. The opportunity to be elected cannot be withheld from other employees on the ground of race, religion, sex, or national origin.

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is elected by the board of directors; the fact that these positions are filled by election does not prevent their occupants from also being "employees" of the bank who are covered by Title VII. A bank can no more exclude blacks from consideration for election to the presidency of the bank than it can exclude them from employment as tellers.

D. King & Spalding's Decision to Deny Plaintiff Admission to Partnership Based on Sex Also Resulted in the Termination of Her Employment as an Associate and thus Violated § 703(a)(1) and (2) of the Act.

In addition to the two theories described above, the complaint also alleged that as a direct consequence of King & Spalding's decision to refuse to admit Ms. Hishon to partnership because of her sex, King & Spalding (a) froze petitioner's compensation as an employee of the firm, and (b) terminated petitioner's employment as an associate pursuant to King & Spalding's admitted "up-or-out" policy. Complaint ¶ 17(b) (c); R. 10; J.A. 12. This claim was separate from the "partnership" claims discussed above, and was dismissed by the district court in a footnote. 25 Empl. Prac. Dec. (CCH) ¶ 31,703 at 20,064-65 n. 1; R. 269; App. A-26.[21]

The complaint expressly alleged that King & Spalding's decision to refuse petitioner's admission to partnership was based on her sex, and these allegations must be accepted as true for purposes of the motion to dismiss. *McLain v. Real Estate Board of New Orleans, supra.* The *result* of the discrimination was, therefore, to "deprive [Ms. Hishon] of employment opportunities or otherwise adversely affect [Ms. Hishon's] status as an employee" of King & Spalding, a violation of the literal language of

[21]In its answer and in the brief and affidavits filed in support of its motion to dismiss, King & Spalding admitted that there was a direct causal connection between King & Spalding's decision not to admit Ms. Hishon to partnership, and the cessation of all raises for petitioner and her ultimate discharge as an associate of the firm on December 31, 1979. J.A. 48, 58, 67. In fact, King & Spalding went to some length to emphasize that it has an "up-or-out" policy and no longer employs "permanent associates" as a matter of policy. *Id.* Thus, King & Spalding argued that, when the decision was made not to admit Ms. Hishon to partnership, her raises stopped and her termination as an associate "within a reasonable period of time" became automatic, under King & Spalding's established "up-or-out" policy. *Id.*

§ 703(a)(2) of the Act. 42 U.S.C. § 2000e-2(a)(2). *See Lucido v. Cravath, Swaine & Moore, supra.*

The district court, however, dismissed this aspect of plaintiff's discrimination claim. The court observed that "this contention will not cut the mustard" because King & Spalding's "long-standing [up-or-out] policies . . . have been uniformly applied by it over the years, for the most part against associates who were male only [*sic*, only male]. Neither in her pleadings, briefs nor arguments does plaintiff even whisper or suggest that such applications by defendant were in any way based on sex." 25 Empl. Prac. Dec. (CCH), at 20,064-65 n.1; R. 269; App. A-26.

The district court missed the point. The thrust of the complaint was that plaintiff did not "make partner" at King & Spalding because she was a woman, and that under King & Spalding's established policy this discrimination also caused both a freeze in her salary advancement as an associate and her discharge as an associate and employee of the firm. That some white male associates at King & Spalding have also been forced to leave the firm when they did not make partner under the firm's "up-or-out" policy is beside the point. Petitioner's male contemporaries did not lose their jobs as associates of King & Spalding because they were males, but for other reasons not covered by Title VII. The complaint alleged that Ms. Hishon lost her job because of her sex.

The court of appeals also rejected the petitioner's claim as a "backdoor" attempt to obtain coverage under Title VII. The majority stated:

> While discriminatory termination alone may have stated a cause of action under Title VII for an unlawful discharge, *Lucido v. Cravath, Swaine & Moore,* when the termination is a result of the partnership decision, it loses its separate identity and must fall

> prey to the same ill-fate as her original attempt to apply Title VII to partnership decisions.
> 678 F. 2d at 1029.

The majority relied on an unprecedented application of the doctrine of assumption of risk in holding that petitioner had no claim under Title VII for wrongful discharge:

> Prospective associates are apprised not only of their potential for partnership, but also of the consequences to be suffered following an unfavorable decision. Just as she accepted a representation made to her concerning partnership consideration, appellant likewise *assumed the risk* that an unfavorable decision would set in motion the termination procedure under the firm's "up or out" policy.
> 678 F. 2d at 1029-30 (emphasis supplied).

Title VII removes discrimination on the basis of race, sex, religion and national origin from the "risks" which "employees" must assume as conditions of employment. Even if petitioner is not entitled to assert a claim under Title VII for denial of admission to partnership, she is at least entitled to assert a claim for wrongful discharge under Title VII based on the theory that King & Spalding's decision to refuse her admission to partnership because of her sex caused her salary as an associate to be frozen and also resulted in her ultimate discharge as an employee of the firm, in violation of § 703(a)(2) of the Act.

CONCLUSION

The decision of the court of appeals below expressly allows large law firms, as well as accounting firms and other businesses organized as partnerships, to discriminate against women, blacks or religious minorities when selections are made among the associates for promotion to partner. The decision below is contrary to the prior de-

cisions of this Court and represents a significant setback in the fight against discrimination. The dismissal of the complaint for failure to state a claim for sex discrimination under Title VII of the Civil Rights Act was erroneous and should be reversed.

Respectfully submitted,

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